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LIABILITY OF MANUFACTURER TO ULTIMATE CONSUMER ON THEORY OF FALSE REPRESENTATIONS.

It is a general rule that the manufacturer of an article that is not inherently dangerous owes no duty to persons with whom he has no contractual relations for injury or damage resulting from its negligent and improper preparation. This rule is announced, among many cases on the subject, in Windram Manufacturing Company v. Boston Blacking Company, Mass., 131 N. E. 454, where it is further declared that the manufacturer of an article likely to cause injury may be liable to persons with whom he has no contractual relations on the ground of fraud, if he made misrepresentations likely to mislead, or employed artifice, or actively concealed defects, or used other means to throw such person off his guard. In respect to the question of fraud, this case follows a well recognized exception to the general rule first stated which imposes liability for fraudulent representations of the manufacturer upon which the ultimate consumer relies.

In an action brought against an attorney by one who suffered loss on account of a wrong report as to the condition of title to property, but who had never employed the attorney who examined the title, the Supreme Court of the United States in Savings Bank v. Ward, 100 U. S. 195, 199, stated that neither fraud nor collusion was alleged or proved, and that the certificates of title were made by the attorney at the request of the applicant for the loan, without any knowledge on the part of the attorney what use was to be made of the same or to whom they were to be presented. Accordingly it was held that the attorney was not liable to such third party.

In Marsh v. Usk Hardware Company, 73 Wash. 543, 132 Pac. 241, the rule of liability was applied as against the manufacturer of a high explosive, who, in marketing the same, gave to the public erroneous information as to its nature and the safe manner of its use; the liability being to one who purchased the explosive from a dealer, and who was injured by its use while following the instructions. In this case there was no contractual relations between the parties, and the Court declared that it was of little consequence whether they regard the giving of the information as technical deceit, or as negligence, assuming that it was the proximate cause of the injury. However, a high explosive is a thing that is intrinsically dangerous to human life.

The same rule is applied in Peterson v. Standard Oil Company, 55 Oreg. 511, 106 Pac. 337, where it appeared that the plaintiff ordered kerosene oil that would stand an open fire test of 120 degrees Fahrenheit and was delivered a distillate that would stand a test of only 88 degrees, the distillate being put up by the defendant and labeled to correspond in quality to the kind ordered.

In Schubert v. Clark Company, 49 Minn. 331, 51 N. W. 1103, liability was fastened upon the manufacturer of a step ladder made of cross-grained and decayed lumber, so varnished and painted that the defects could not be discovered, thereby rendering it dangerous, to the employee of one who purchased it from the middleman and was injured in its use.

In respect to the manufacturer of food for human consumption, it is held in Davis v. Van Camp Packing Company, Ia., 176 N. W. 382, 77 A. L. R. 649, that such manufacturer must exercise the highest degree of care in the selection, preparation, cooking, canning, packing, and handling of his merchandise. The plaintiff in this case was a member of the family of one who purchased a can of pork and beans from a middleman, and it was alleged that he became sick from eating of the pork and beans. The petition alleged among other

things that the printed label on the can recited, that "the contents of this can are ready for the table, and can be served hot or cold." This was followed by directions for preparation for serving hot. On one end of the can was stamped the word "sanitary." The evidence showed, however, that this word was stamped by the manufacturers of the can as their trademark, and applied to the can, rather than the contents. This was not known to the consumer, and the Court stated that the entire label would have a tendency to lull the purchaser into a sense of security. The trial Court directed a verdict in favor of the defendant, which was set aside by the Supreme Court and the cause remanded for a new trial. The Court held that there was an implied warranty of fitn[illegible] which followed the purchase of the can by the consumer, and that the manufacturer was liable to the person injured by eating the food for a breach of this warranty.

In the Windram Manufacturing Company case, supra, it is held that a mere failure to disclose known facts does not amount to fraud, and is not the basis of an action for deceit, unless the parties stand in such relation to one another that one is under legal or equitable obligation to communicate the facts to the other. This was an action to recover for damages due to losses caused by defective cement manufactured by the defendant and used by the plaintiff in his business of pasting linings to fabrics by means of machinery, and which injured the fabrics on which it was used. There was no allegation of misrepresentations made covering the cement, but it was alleged that the defendant concealed the dangerous character of the cement by failing to place some warning on the container. This case followed the general rule as to the nonliability of a manufacturer to persons with whom he has no contractual relation.

In the case of Kuelling v. Roderick Lean Manufacturing Company, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, the manufacturer of a road roller, who willfully and fraudulently made it of defective materials which he concealed by putty and paint, was held liable for injuries caused thereby to one who put the roller to its intended use, although it had passed through the hands of wholesale and retail dealers so that there was no privity of contract between the manufacturer and the injured person. The Court declared that there were present not only fraudulent deceit and concealment, but what also amounted to an affirmative representation that the roller was sound, as the manufacturer, by so concealing the defects that no weakness could be detected, must be held to have represented the roller to be in a perfectly marketable condition.

POSSIBLE PARTNERSHIP LIABILITY UNDER THE BUSINESS TRUST[1]

Of late years there has been a rapid growth in the use of the so-called "Business Trust," that is, a trust estate operating in the field of commerce and trade and doing the work of the ordinary private business corporation. The business trust, as we know it, is either a testamentary trust, or a voluntary trust controlled by an instrument executed by trustees to whom there has been or will presently be transferred the property or money to constitute the corpus of the trust.

The business trust first came into its own in this country as a means of handling valuable real estate and particularly in Massachusetts. In that state we find a long line of well considered cases involving such use of the voluntary trust form of business organization. In that state also, and in Rhode Island as well, we find an early line of cases covering the operation of commercial businesses under testamentary trusts. In Illinois, with the growth of capital and with the rise of property values, especially

(1) A paper read before the Legal Club of Chicago. Reprinted from the Illinois Law Review.

in Chicago, we find an increasing use of the business trust, both under testamentary provisions and under trust agreements, but until comparatively recently this use has been limited and there are only two or three Illinois Supreme Court cases which bear directly on the subject. Many Chicago loop office buildings are operated by testamentary trustees; for example, the Conway Building owned by the Marshall Field Estate, the National City Bank Building owned by the Shepherd Brooks Estate, and the various Lehmann Estate buildings. Other loop buildings are held and operated by trustees under trust agreements, as, for example, until recently, the Masonic Temple. Of late years, also, the trust form of organization has been made use of to cover the ownership and management of the many co-operatively owned apartment buildings on the North Side.[2] Also, we have in Chicago business trusts engaged in industrial pursuits, as, for example, the trust which controls the surface street car lines.

The business trust under modern conditions is found to have certain advantages over the ordinary corporate form of doing business. These advantages are the convenience, continuity, and flexibility of its management; its right to do business in any state; its freedom, up to date, from inquisitorial laws; and its present freedom from the many annoying forms of corporate taxation. On the other hand, there are at the present time, certain very serious practical disadvantages in using this form of organization: "the employment of the voluntary business trust is comparatively new; attacks upon its validity in new respects will probably still be made; regulating legislation affecting it may reasonably be expected; the precise nature of the beneficiary's interest is still undetermined; what rights the beneficiaries may have in addition to those essential to cestuis que trust are questions still to be decided";[3] but most important of all, the line of demarcation between the domain of the business trust and that of the partnership is yet to be clearly drawn by the courts. It is the last named point which is the subject of this article.

The first question to be considered, then, is whether or not the trust form for a business organization permits liability of the investors or shareholders to be limited. Are the beneficiaries, who voluntarily make themselves the recipients of the trust earnings and profits, free from liability for the indebtedness of the trust business, or are they individually liable for the whole of it as partners?

The only basis for predication of partnership liability upon the beneficiaries is the agency theory that he who accepts the income and profits arising from a business thereby ratifies all the acts of the manager of the business, and as he has had the benefits of the profits, so must he also suffer for the losses. But it is submitted that if ratification or non-ratification by the beneficiary has no legal effect upon the act of the manager, if the manager is in no sense the agent of the beneficiary, this doctrine is not applicable.[4]

Now it is well settled that a trustee is not an agent.

> "An agent represents and acts for his principal, who may be a natural or an artificial person. A trustee may be defined, generally, as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts for his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal."[5]

(2) In the case of the earlier of these buildings, of course, the trust form of organization was made necessary by the former Illinois statutory prohibitions against real estate corporations.

(3) See Thompson "Business Trusts as Substitutes for Business Corporations" 45.

(4) See Sears "Trust Estates as Business Companies" 108.

(5) Taylor v. Davis (1884) 110 U. S. 330, 4 Sup. Ct. 147.

The trustee is not an agent either of the cestuis que trustent or of the estate. He is the owner of the trust property and of the trust business. He is the principal, the master. Since, in relation to the property and the business in which it is employed, the trustee is the principal, upon no recognized theory of agency can the beneficiary be bound for the trustee's obligations with respect to the trust business. This is true if the trust organization in question is a true trust; if it is not a true trust, then the question of liability is an open one. Is there then a definite test by which we can ascertain whether or not the organization qualifies as a true trust?

> "If the instrument of trust under which the business is operated confers absolute and uncontrolled power upon the trustee with respect to the management of the property given him, and the beneficiaries have only the rights that are implied because they are fundamental to the trust relation, that is, to call upon the trustee to account, to have him removed for misconduct or negligence, to receive the income while the trust lasts and their share of the trust estate upon its termination, then plainly the arrangement is a pure trust—"[6]

and the beneficiaries or shareholders cannot by any extension of partnership or agency theory be held liable to creditors of the trust business.

However, owing to the desire of investors to do business under a trust form of organization with all its advantages and yet to maintain as much control over their business as possible, many business trust agreements have provided for certain rights in the beneficiaries beyond those fundamentally inherent in cestuis que trustent; for example, beneficiaries are given the right to hold meetings and fill vacancies among the trustees, to elect trustees periodically, to remove trustees and choose successors, to adopt amendments to the trust agreement, to direct or agree to a termination of the trust and to give various directions to the trustees as to the management of the trust business. In the case of such instruments the question at once arises, is the organization a true trust, or is it an agency or partnership arrangement? If it is the latter, then, of course, the beneficiaries are personally liable for the debts of the trust business.

There are two cases on the subject in England, Smith v. Anderson,[7] and Cox v. Hickman,[8] which have settled the law in that country. In Smith v. Anderson, shares in a number of submarine telegraph companies were purchased by subscription and vested in trustees. The trusts were declared by deed between the trustees and a covenantee on behalf of the beneficiaries. The income of the trust might with the consent of the beneficiaries be reinvested in submarine telegraph shares. Meetings of the beneficiaries might be held for the purpose of receiving reports from the trustees and of appointing new trustees to fill vacancies. Action was brought to have the trust wound up as being an illegal association because, being an association of more than twenty persons formed for the purpose of carrying on a business having for its object the acquisition of gain, it was within the British Companies Act and had not been duly registered under that Act.

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In Smith v. Anderson, then, the court was of the opinion that the power to fill vacancies among the trustees at a meeting of the shareholders and the provision for ratification of the trustees' investments by the beneficiaries did not give the beneficiaries sufficient control over the trustees to take the organization out of the realm of the true trust.

In Cox v. Hickman, which was a House of Lords case, certain manufacturers who became financially embarrassed executed a

(6) Thompson "Business Trusts" etc. 28.

(7) 15 Ch. Div. 247.

(8) 8 H. L. C. 268.

deed to which they were parties of the first part, certain other creditors as trustees, parties of the second part, and all the other creditors, parties of the third part. The deed assigned the property of the embarrassed concern to the trustees and empowered the trustees to carry on the business, to divide the net income among the creditors pro rata, and also gave power to a majority of the creditors assembled at a meeting to make rules for conducting the business or to put an end to it altogether. Certain of the trustees resigned, the other trustees who continued to carry on the business became indebted to the plaintiff and gave him bills of exchange accepted by themselves on behalf of the trust business. On non-payment of the bills of exchange the plaintiff sued two of the creditor beneficiaries on the theory that the beneficiaries were all partners in the business. On appeal to the House of Lords; it was held that there was no partnership and that the arrangement constituted a true trust.

In Cox v. Hickman, then, the highest court in England was of the opinion that power in the beneficiaries to make rules for the conduct of the business by the trustees or to terminate the business altogether by a majority vote was not a sufficient control of the business by the beneficiaries to make the organization something other than a trust.

In this country, our judges have not been willing to go as far as the English courts. The Massachusetts courts in particular have been very conservative in their decisions and tend to hold that very slight control by the beneficiaries makes the business a partnership business.

In Hussey v. Arnold,[11] decided in 1904, several persons formed an association for investment in real estate and the management thereof. The property was vested in trustees and the trust agreement declared that contracts entered into by the trustees should provide against any personal liability on their part, and that the beneficiaries should not be liable for any of the trust indebtedness. Any of the trustees could be removed and a successor could be appointed by vote of three-fourths in value of the shareholders, and they could also fill vacancies among the trustees caused by death or resignation. Also, the trust could be terminated by a writing signed by three-fourths in value of the shareholders. The association became insolvent and a suit in equity was brought to wind up its affairs. This is the first well considered case in Massachusetts, and, although the validity of the trust was not directly in question, the court was not satisfied as to the exact status of the organization.

In William v. Johnson,[12] decided in 1911, a railroad company, wishing to dispose of some of its unused land, conveyed the land to trustees, who were authorized by the deed of trust to issue certificates of interest at a nominal par value of $100 per share, in order to develop this and other land acquired by the trustees, shareholders were not to have any legal title to the trust property itself and were not to have the right to call for a partition. The trustees were to have absolute control over the disposal of all the trust property and were given very complete and specific powers. The trust was to continue until the expiration of twenty years from the death of the last survivor of certain named persons, unless three-fourths in value of the beneficiaries should appoint an earlier time for its termination by an instrument in writing duly signed and acknowledged. This right to terminate the business was the sole respect in which the beneficiaries had any control over the management of the trust business.

The railroad company was the New York, New Haven & Hartford Railroad Company, and the lands were valuable lands located in Boston. The only shares

(11) 185 Mass. 202.

(12) 208 Mass. 544.

issued were issued to the railway company. The court held that the scheme contemplated a real estate business and a speculation that might continue a long time and become gigantic, and of which the railroad corporation was then the sole owner. The court said in holding the trust agreement invalid:

> "It needs no argument to show that ordinarily the proprietorship of such a business by the railroad company as a beneficiary is not within its corporate powers."

However, the court also argued that the trust instrument really created a partnership, saying:

> "Moreover, if other stock is issued by the trustees, as they have power to do, and other parties are brought into the enterprise and other lands are bought, the railroad corporation will be in a community of interest in the profits and losses and in all the activities of the business with other owners. It will be virtually if not technically in partnership with them. It is familiar law that a corporation cannot enter into a partnership."

In this case, the sole control of the beneficiaries over the trustees was the power to terminate the trust by a three-fourths vote, and in the English case of Cox v. Hickman this power was held not sufficient to make the proposed trust a partnership. It is contended that although the court may have been right in holding that the making of such a trust instrument by a railroad corporation was beyond its corporate powers, nevertheless the court is wrong in saying that the railroad as a beneficiary under this trust was in a virtual if not a technical partnership with the other beneficiaries.

The Massachusetts case most relied on by organizers of business trust is Williams v. Milton,[13] decided in 1913. The case came up on petition for the abatement of taxes assessed against the plaintiffs as trustees of the Boston Personal Property Trust. The taxes were assessed on the theory that the property held under the trust was partnership property to be assessed in Boston where the partnership (if there were a partnership) had its place of business.

The court first discussed the difference between a trust organization, which nevertheless is a partnership because the beneficiaries are really the principals whose instructions are to be obeyed by their agents, the trustees, and a true trust organization where the property is the property of the trustees, the beneficiaries having only the right to have the property managed by the trustees for their benefit and to share in the avails when the property is sold. The court then said:

> "This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust, the property contributed by the certificate holders, or that bought with money contributed by them, was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust to divide the trust funds or the proceeds thereof among them. The certificate holders are throughout called "cestuis que trustent." The certificate holders, or "cestuis que trustent" are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alterations, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All

(13) 215 Mass. 1.

that the certificate holders, or cestuis que trustent, can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but it is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose is provided for in the trust indenture. The certificate holders or "cestuis que trustent' as' they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not socii. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of corpus when the trust comes to an end."

The basis of the decision in Williams v. Milton is, of course, the lack of control by the beneficiaries. However, the court seems to think that it was important that the little control which they could exercise in consenting to an amendment to or a termination of the trust was not to be exercised at a meeting but individually. It is difficult to perceive why the court attributed this importance to a meeting.

In Frost v. Thompson,[14] a later Massachusetts case, decided in 1914, certain creditors sued on a note signed by the treasurer of the business trust, the Buena Vista Fruit Company. The original defendants were the trustees. Later, all the beneficiaries under the trust were made parties defendant and a decree sought against them individually on the theory that the business was a partnership business.

(14) 106 N. E. 1009.

The court said:

"A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership. That was explained at length in Williams v. Milton, 102 N. E. 355.

"Tested by the principles there laid down, this organization is a partnership and not a trust. It is a voluntary association, organized under two instruments, one called a "declaration of trust" and the other, "by-laws." These two instruments provide that the shareholders representing two-thirds in value of the outstanding shares have power to remove either or all of the trustees at any time, and to appoint others to fill vacancies, to terminate the trust at any time earlier than that limited for its duration in the declaration of trust, and to terminate it by requiring conveyance of the property to other trustees upon new trusts or to a corporation. A majority of the stockholders at any time by vote may amend the declaration of trust. Also the by-laws may be "altered, amended or repealed" by vote of the majority of the shareholders "at any annual or special meeting of the shareholders." These provisions demonstrate that this association is a partnership and not a trust."

It is difficult to conceive how partners in a small partnership business could have more absolute control of their own busi-

ness than was here given to the beneficiaries under the terms of the supposed trust agreement, and the case illustrates the extent to which some of the earlier trust instruments have gone in attempting to keep the control of the business in the hands of the investors.

In Dana v. The Treasurer,[15] a still later Massachusetts case, decided in 1917, the question was whether an interest in a real estate trust, the property of which was located outside of Massachusetts, was subject to a succession tax in Massachusetts. The court said:

> "The declaration of trust provides for meetings of shareholders, and that at those meetings the shareholders shall have power to elect the trustees and to alter and amend the declaration of trust. There is also a provision in it whereby the time for winding up its affairs can be shortened or extended by the shareholders at the shareholders' meetings.
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> "This declaration of trust created a partnership. It is well within the distinction between trusts stated at length in Williams v. Milton, where the cases are collected."

Here again we find the court relying upon Williams v. Milton and the tests which are set up in that case. But before we leave the Masachusetts decisions, it is interesting to note that the House of Lords case of Cox v. Hickman upheld a trust which could not possibly have withstood the test of Williams v. Milton. Remember that in Cox v. Hickman the beneficiaries had power to hold meetings and to adopt rules for the conduct of the business or to terminate the business altogether.

However, when we pass from Massachusetts to some of the other states, we find the courts more apt to follow the liberal views of the English cases rather than the Massachusetts decisions. For example, in Rhode Island Hospital Trust Co. v. Copeland,[16] decided in 1916, the trust instrument provided that shares were to be issued called "preferred and common shares" of the par value of $100 each. The trustees were to sell the shares at public or private sales to an amount not to exceed in the aggregate $200,000. The owners of the shares were given power to vote at meetings, at which meetings they could consider the reports of the trustees and appoint new trustees to fill vacancies. The trust agreement could be amended by a two-thirds vote of the shareholders with the consent of the trustees, and also the shareholders alone by a like vote could terminate the trust.

The suit came up on a bill by certain trustees of a testamentary trust, who held shares in the business trust in question, asking for the instructions of the court as to whether they were authorized in their fiduciary capacity to hold the shares of said business trust and whether or not their estate as a shareholder was personally liable for the indebtedness of the business trust. The court ignored the Massachusetts cases entirely and quoted the English cases of Cox v. Hickman and Smith v. Anderson relying upon them in holding that the organization was a true trust and that there was no partnership liability. Notice in this case, the shareholders had the right to amend the trust instrument with the consent of the trustees only, but that they had the unqualified right to terminate the trust. Under the test of Williams v. Milton this would have been sufficient to make the organization a partnership.

We find our first Illinois case on the subject in Hart v. Seymour,[17] decided in 1893. In this case some twenty-eight individuals formed an association, evidencing the form of their organization, the nature of their business enterprise, and their respective rights, duties and obligations by a trust agreement executed by all of the associates. Their property, real estate, was

(15) 116 N. E. 941.

(16) 39 R. I. 193.

(17) 147 Ill. 598.

vested in three trustees. The instrument provided that by a two-thirds vote of the shareholders the trustees might be removed and vacancies, however caused, might be filled. Also the shareholders were given power at any general meeting to give directions concerning the capital and property of the association and the management and disposition thereof, provided such directions were consistent with the terms of the trust agreement and were assented to by a majority in interest of all the shareholders. It was contended in the suit that the trust agreement was invalid and that the legal title to the land in controversy was in the shareholders. The court said:

> "The association not being incorporated was in contemplation of law a mere co-partnership composed of the several associates who executed and thereby became parties to the trust agreement. The grantees in the deeds therefore, if they took the land in trust, took it in trust for their firm composed of ascertained partners, all capable of being beneficiaries of the trust, ... but we are not prepared to yield our assent to the view that in determining the equitable rights of the parties, the trust agreement is not to be taken into account. By that agreement, the association embarked in the business of buying, improving, developing and selling suburban property in or near the City of Chicago, and with a view of having that business carried on with greater efficiency and convenience, three of their number were appointed trustees, to take and hold the title of the land purchased and have general control of the affairs and business of the association. .. .. It follows necessarily that the equitable rights of the parties to the land must be determined by the provisions of the agreement. The nature of the trust in accordance with which the trustees took title is to be determined by the trust agreement and by that alone."

The case then turned upon whether the trust was invalid as containing a restraint upon alienation. The court held that there was no restraint and that the trust was valid. This case was decided before the Massachusetts cases which recite the various tests to use in ascertaining whether the agreement creates a trust or a partnership. A majority of the shareholders could remove the trustees and also could give directions for the management of the business, provided only that their directions were consistent with the trust instrument. If the court were to consider the same case today and argument were made against the validity of the trust because of the almost complete control by the shareholders, it is conceivable that the court might reach a different conclusion.

In Holmes v. McDonald,[18] decided in 1907, certain individuals entered into an agreement for the organization of a society for savings, of which any person might become a member by signing the agreement. The agreement provided that the society should be under the immediate control of the board of trustees and that each member should be bound by the agreement and should not possess any right enforcible other than in conformance herewith.

This is the first Illinois case dealing with a business trust engaged in other than real estate business. The organization was a commercial trust carrying on a banking business. The beneficiaries had no control of any kind over the trustees and, although this point was not argued, the court properly held that the organization was a true trust.

In Dieus v. Scherer,[19] decided in 1917, several beneficiaries subscribed various sums towards the purchase of certain lots, title to which was taken by trustees. All the contributors executed a declaration of trust by which it was agreed that the

(18) 226 Ill. 169.
(19) 277 Ill. 168.

parties should have interests in the property in proportion to the amounts contributed by them for the purchase. The trustees were to subdivide and sell the land and after paying expenses divide the balance of the proceeds of sale among the contributors. The contributors apparently had no control of any kind over the trustees. The court, without any discussion of the terms of the trust instrument, held that it created a "joint venture" by which the interests in the realty partook of the nature of personalty.

Although the question as to whether the arrangement was a trust or a partnership was not squarely an issue, it is interesting to note the court's use of the term "joint venture."

These three cases are the only Illinois Supreme Court cases directly on the subject and in none of them is the question of the validity of the trust considered from the point of view of control of the trustees by the beneficiaries. When the first case does go up on this question, will our Supreme Court follow the Massachusetts or the English view? One would be inclined to think that it will come closer to following William v. Milton than Cox v. Hickman.

When we turn to the federal reports, we find several well considered cases. In re Associated Trust,[20] decided in 1914, in the District of Massachusetts, the case turned upon the question as to whether the trust were an unincorporated company, and, if not, whether the trustees as such were subject to adjudication in bankruptcy under the Bankruptcy Act.

The Court said:

"The respondent is a Massachusetts real estate trust, a form of business organization which is not uncommon in that state and is very uncommon elsewhere. Its character is to be determined by the laws of Massachusetts, where it is located. The legal character of trusts resembling the respondent has several times arisen in the Massachusetts courts, generally upon questions of taxation, and the court has been called upon to decide whether they were to be taxed as partnerships, or as ordinary trusts.

"In some cases, such organizations have been held to be partnerships and in others to be strictly trusts. The distinction between the two turns upon the provisions of the trust agreement or declaration. In cases where, by the declaration of the trust, the shareholders are given substantial control of the trust property, the trust is held to be a partnership; in cases where the shareholders have no such control, the trust is held, for that purpose of taxation, to be of the same sort as the usual testamentary trust, and not to be a partnership.

"No middle ground is found in the Massachusetts decisions. The respondent therefore contends that it is either a strict trust having no separate entity which can be adjudicated or that it is a partnership, and that in neither case can a decree of adjudication be made upon this petition.

"The character of the respondent is to be gathered from the trust deed. Under it, the trustee declared that he would take and hold in trust money paid to him by other persons to the amount of $1,000,000, for which he would issue transferable certificates having a face value of $100, entitled to interest, and to participate in surplus earnings. The trustee is given very broad powers as to the management of the property in which the trust funds are invested, with the right to determine what part of the income shall be divided and what part shall be retained as surplus. He has no power to bind any of the certificate holders; and they have no power to interfere directly in the management of the

(20) 222 Fed. 1012.

property, and no title to it. Up to this point, there would seem to be nothing in the organization differentiating it under the Massachusetts decisions from what may be called an ordinary trust; that is, the beneficiaries, cestuis, or certificate holders (whichever they may be called), have no interest in the trust property and no right of joint action for control of it. They are in substance like beneficiaries in a trust under a will. There is no organization having a distinct entity apart from the trustee.

"But the declaration of trust also provides that, if the trustee resigns, the certificate holders may at a meeting called for the purpose, elect a new trustee; and that the certificate holders by a three-quarters vote of the outstanding shareholders may determine the trust, increase the number of shares and amend the declaration of trust.

"It thus appears: (1) that the respondent has a capital contributed by the certificate holders; (2) that the future managers are to be chosen by the certificate holders; (3) that the character, scope, and size of the enterprise may be changed by the certificate holders, and that it may be determined by them; (4) that these rights and powers are given to the certificate holders in the instrument by which the associated trust is constituted.

"The absolute powers of termination and amendment give the certificate holders, it seems to me, the ultimate control of the business of the trust whenever they choose to take the power into their hands. They have not yet done so; but the character of the organization is to be gauged rather by the powers of the certificate holders than by the extent to which those powers have as yet been exercised. The analogy between the respondent organization and the corporation is apparent. The certificate holders clearly possess many of the most characteristic powers of stockholders. If the expression "unincorporated companies" in the Bankruptcy Act does not describe such an organization as the respondent, it is difficult to see what meaning can be given to those words. To hold the respondent a partnership within the Bankruptcy Act would lead to results never contemplated by anybody, and would impose upon the certificate holders obligations which neither they nor the creditors of the trust supposed existed. It would be a very unjust result. To hold the respondent is not an association and is nothing more than a strict trust, is almost as far from the fact as to hold it to be a partnership. The certificate holders voluntarily united into a business organization in which they invested their money under a contract by which they acquired certain individual rights against the trustees, and certain other rights to be exercised by joint action of all the certificate holders. "Unincorporated company" seems to me exactly to describe what the respondent is."

However, in the Associated Trust case, after setting out very clearly the Massachusetts tests and holding that in the case at bar the beneficiaries' control made the organization not a true trust, the court begged the question by saying that to hold it a partnership would be very unjust and that therefore it was "an unincorporated company" and liable as such to be adjudicated a bankrupt. Note that in this case the court said the question turned upon whether the beneficiaries had "substantial" control, but it does not illustrate what it means by "substantial."

In Simson v. Klipstein,[21] decided in 1920 in the District of New Jersey, the court

(21) 262 Fed. 823.

reasoned that power in the beenficiaries to amend the trust agreement without the trustees joining in the action was sufficient to make the organization a partnership. In this case two individuals entered into a trust agreement establishing a proposed business trust under the name Midvale Chemical Works and constituting themselves the trustees thereof. The court said:

"Whether or not an association is a trust or partnership depends upon the instrument creating it. Real estate trusts, such as this claims to be, have arisen principally in Massachusetts. Upon a careful examination of the Articles of Association of the Midvale Chemical Works and of the cases bearing upon this question, I am of the opinion that the Midvale Chemical Works is a partnership. The test is the power of control of the management of the association. If the certificate holders have the power of control, the association is a partnership; if they have not, and the power of control is in the trustees, it is a trust.

"It is not necessary that the power of control should be actually exercised for the partnership to exist. It is sufficient if the power is given, though never exercised.

"Power of control in the case at bar is given to the certificate holders in the articles of association. A meeting may be called at any time, and the certificate holders may amend any and all of the articles of the association.

"Also in article XI it is provided that "the trustees shall have the power to contract and carry on in the name of and for the association any business which could be lawfully conducted or carried on by any individual, and, in the conduct of such business, may use and invest any funds of the association and shall have full general power and authority to buy, sell, pledge, mortgage, grant, convey, and exchange property of every description, real, personal or mixed," etc.

"Suppose at one of their meetings provided for in article XI, the certificate holders should pass a resolution amending article XI, line 1, by striking out the word "Trustees" and substituting in lieu thereof the words "Certificate holders," the trustees would be practically stripped of their control and operation of the enterprise.

"In article XXI, it is provided that: "The trust here created shall terminate at the expiration of 21 years after the death of the last survivor of the above named trustees," etc.

"If in any of their said meetings the certificate holders should pass a resolution amending the said article, so that the trust should terminate forthwith, the trustees would be powerless and the trust would come to an end. The trustees have no vote in such matters, nor have they, so far as the facts before me disclose, any capital of their own in the enterprise to protect. It is evident that the power of control of the management is in the certificate holders, and may at any time be exercised by them notwithstanding any opposition the trustees might offer. The certificate holders are associated together by the terms of the creative instrument. The association is therefore a partnership and not a trust."

The only case in which the question of the control of the trustees by the beneficiaries as affecting the validity of the modern business trust has been passed on directly by the Supreme Court of the United States is Crocker et al. v. Malley, [22] decided in 1919.

An income tax was assessed to the plaintiffs as a joint stock association under the Income Tax Act of 1913, and was levied in

(22) 39 Sup. Ct. Rep. 270.

respect to dividends received from a corporation that itself was taxable upon its net income. The court said:

"The plaintiffs say that they were not an association but simply trustees and subject only to the duties imposed upon fiduciaries. . . . By the declaration of the trust, the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the cestuis que trust (who shall be trust beneficiaries only, without partnership, associate or other relation whatever inter sese)," . . . . A provision was made for the compensation of the trustees not exceeding one per cent of the gross income unless with the written consent of a majority interest of the cestuis que trust. A similar consent was required for the filling of a vacancy among the trustees, and for a modification of the terms of the trust. In no other matter had the beneficiaries any control.

"The declaration of the trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, ... There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. 'The certificate holders are in no way associated together nor is there any provision in the instrument for any meeting to be held by them. The only act which (under the declaration of the trust) they can do is to consent to an alteration of the trust' and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it 'is not to be had in a meeting, but is to be given by them individually.' 'The sole right of the cestuis que trust is to have the property administered in their interest by the trustees who are the masters, to receive income while the trust lasts and their share of the corpus when the trust comes to an end': Williams v. Wilton, 215 Mass. 1.

"The question is whether a different view is required by the terms of the present act. As by the act trustees and associates acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs are undeniably trustees, if they are to be subjected to a double liability, the language of the statute must make the intention clear. The requirement of the act is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year to 'every corporation, joint stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' The trust that has been described would not fall under any familiar conception of a joint stock association, whether formed under a statute or not. If we assume that the words 'no matter how created or organized' apply to 'association' and not only to 'insurance company,' still it would be a wide departure from normal usage to call the beneficiaries here a joint stock association when they are admitted not to be partners in any sense and when they have no joint control or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint association within the meaning of the act unless all trustees in the act is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrast-

ed functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law."

Here, then, we have the highest court in the land upholding the validity of a modern business trust, but in a case where the beneficiaries control only to the extent that their consent must be had to an increase of the trustees' compensation, to the filling of a vacancy among the trustees and to a modification of the trust instrument.

To summarize the decisions which have been quoted, the inquiry in every case should be, who are the owners and masters of the property and of the business in which it is employed. If the trustees are the masters, then they are the principals, the arrangement is a pure trust and the beneficiaries can have no partnership liability. If the holders of the beneficial interests are the masters, then they are the principals, and the trustees, so called, are mere agents. If the holders of the beneficial interests are the principals and the trustees their agents, then, of course, the holders of the beneficial interests must be personally liable as partners for the indebtedness of their business.

The best test we have so far as to who are the owners of the business, the trustees or the holders of the beneficial interests, is set out in Williams v. Milton. Nevertheless, this test is a very unsatisfactory one. The court in that case said that if the cestuis are to be associated through meetings and have powers sufficient in extent to make them the masters over the trustees, the arrangement is not a trust but a partnership. This definition is not sufficiently specific to enable us to know just what degree of association and what degree of power make the beneficiaries the masters. In that very Massachusetts case, the shareholders had a certain control, in that their consent was required for an amendment of the trust instrument and for a termination of the trust before the time fixed in the deed. It was held that these were not rights sufficient in extent to convert the trustees into agents. On the other hand, in the same case the court indicated that should the alleged trust instrument reserve to the beneficial owners the right to elect the trustees annually or the right to hold meetings, remove trustees, give instructions to the trustees, amend the declaration of trust and direct the trustees to terminate the trust, then the arrangement would be considered a partnership.

However, if power to control the trustees is alone to be the absolute test, then what shall the decision be when certain of the cestuis que trust are the trustees and own perhaps a majority of the beneficial interests.[23]

Until more general consideration shall have been given to the whole question by the courts, and it can be said that there is a preponderance of authority on all points, the only absolutely safe course to pursue in Illinois in drafting the instrument under which the business trust is to be organized is to make certain that the beneficiaries are not given associate relation, or any rights beyond those which the law recognizes as inherent in cestuis que trustent. In the present condition of the law it is certainly dangerous for the trust instrument to provide for any legal effect to arise out of any action taken by the holders of the beneficial interests. (24) To be absolutely on the safe side, the instrument must provide that the beneficiaries shall have nothing more than a common interest in the profits of the business, and that by no interpretation of any of the trust provisions can they be held to have power, alone, without the trustees, to take an action binding upon the trustees or the trust property.

If one is of the opinion that the Illinois Supreme Court would agree with the decision of the United States Supreme Court

(23) See "A Survey of the Business Trust," by Frederick A. Thulin in the January, 1922, number of the Illinois Law Review.

(24) See Sears on "Trust Estates," p. 172.

in Crocker v. Malley or with the Massachusetts Supreme Court in Williams v. Milton, then it would be safe to let the trust instrument provide for control by the beneficiaries to the extent that their consent shall be required to the filling of a vacancy among the trustees or to the making of an amendment to the trust agreement, but this consent should be given individually and not at a meeting of the beneficiaries.

NOBLE B. JUDAH.

Chicago, Ill.

PRINCIPAL AND AGENT—ADMISSIBLE DECLARATIONS.

AMERICAN CAST IRON PIPE CO. v. BIRMINGHAM TAILORING CO.

91 So. 484.

Supreme Court of Alabama.
October 27, 1921.

Evidence of the acts or declarations of an asserted agent is admissible, where there is other testimony tending to show the fact of agency.

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by the Birmingham Tailoring Company against the American Cast Iron Pipe Company upon an assignment of wages. Judgment for the plaintiff, and the defendant appeals. Transferred from Court of Appeals under section 6, p. 449, Acts 1911. Affirmed.

Upon request of counsel for the defendant, the trial court found the following to be the fact: That one Jim Sadler was indebted to plaintiff in the sum of $5.50, balance due on clothing purchased from plaintiff on 5th day of June, 1915; that at the time of the said purchase he executed to plaintiff a certain assignment of his wages due him by defendant in the amount of the indebtedness owing by Sadler to plaintiff which assignment contained an order to defendant to pay plaintiff said amount; that subsequently thereto, on or about the 12th day of June, 1915, plaintiff's agent, carried said assignment to defendant's agent, who was behind a counter or window in the office of defendant at defendant's place of business in the city of Birmingham, Ala., and who at that time was engaged in making up pay envelopes; plaintiff's agent, who gave the said assignment and order to defendant's agent had seen the said agent of defendant above referred to in said office on other occasions, and had given him other assignments on other and prior occasions which had been received by said agent, and later the parties giving said assignment had gone to plaintiff and gotten said assignments released; that on this occasion plaintiff's agent handed the assignment and order executed by Jim Sadler to said agent or cashier of defendant; that defendant's agent took the said assignment and order executed by Jim Sadler, and after looking at it, turned to the books of the defendant company, and, after looking on said books, said to plaintiff's agent, "Well, it's here," that thereupon the plaintiff's agent left, and defendant's agent retained in his possession said assignment; that some time afterwards defendant failed and refused to pay the said amount set forth in said assignment and order to plaintiff; that the defendant was at the time of the presentation of said assignment indebted to the said Jim Sadler in a greater sum than the said sum stated in said assignment, which said sum, nor any part thereof, has been paid by defendant to the plaintiff since the delivery to the defendant of said assignment; that the said agent of defendant to whom said assignment was given by plaintiff's agent was the duly authorized agent of defendant; that he accepted said assignment and agreed to the transfer on behalf of defendant and that in doing so he was acting within the line and scope of his employment by defendant.

McCLELLAN, J. This is the second appeal in this case, the former review by the Court of Appeals being reported in 16 Ala. App. 583, 80 South. 157. The reversal was then predicated on a construction of Code, § 5360, that this court, in Jones v. Hines, 205 Ala. 145, 87 South. 531, 532, found belatedly, was erroneous.

The action, instituted by appellee against appellant, is based on an assignment of an order for $5.50, wages the appellant was due one Sadler, its employee, for work done within a stipulated period. It is manifest from the record that the findings, conclusions, and judgment of the trial court were justified by the evidence and inferences therefrom. The appellant offered no evidence. It will serve no useful purpose to comment upon or to reproduce the evidence further than to observe that the facts and circumstances descriptive of the occasion upon which the assignment or order was presented by Blackwell at the office of the

appellant show with requisite certainty that the person receiving the assignment or order so presented was at the time a representative of the appellant and then engaged in the service of the appellant. Evidence of his acts in receiving the paper, in turning to books in the office with the view to ascertaining the state of Sadler's account, in saying, "it's here," and in retaining the paper—this in keeping with the practice, properly admissible, on like previous occasion—was, under the quite plain indicia of authority and relation shown by the testimony, admissible as of the res gestae of the event, the presentation of the order or assignment upon which the action is based. The admission of evidence of these matters did not at all offend the familiar rule forbidding proof of agency by mere declarations of the asserted agent. Evidence of the acts or declarations of an asserted agent is admissible where, as here, there is other testimony tending to show the fact of agency. Robinson v. Greene, 148 Ala. 434, 440, 43 South. 797, and Salvo v. Wilson, 189 Ala. 446, 449, 66 South. 613, among others. And declarations under such circumstances are not within the category of self-serving declarations held, on proper occasion, to be inadmissible.

There is no error in the record. The judgment is affirmed.

Application for rehearing Overruled:

NOTE—*When Acts and Declarations of Agent Are Admissible to Prove Agency.*—"That the declarations of a person, who assumed to act as agent of another, are not admissible to establish the agency is well settled; but it is equally well settled, that after the party alleging the agency has made a prima facie case of agency against the principal, any declarations made by the agent in the prosecution of, and relative to the business contemplated by such agency, are admissible against the principal." Peck v. Ritchey, 66 Mo. 114, 118.

In Werth v. Ollis, 61 Mo. App. 401, 407, the Court states the rule in this language: "Whenever there is independent evidence tending to prove the agency, it is competent to prove all the acts of the alleged agent pertaining to the business, as well as his declaration that he was acting as agent in the particular transaction."

In Oil Well Supply Company v. Metcalf, 174 Mo. App. 555, 560, the Court says: "It is true you cannot prove that a partnership existed by the acts and declarations of the alleged partner. But if you first make out a prima facie case, as was done here, that a partnership exists, it is then proper, in corroboration, to show that he acts as such and stated that he was. As already seen this is the rule as to agency. And the rule that the act of one partner binds the other springs from agency."

This rule is also recognized in the following jurisdictions: Mullen v. Quinlan & Co., 195 N. Y. 109, 87 N. E. 1078, 24 L. R. A. (N. S.) 511; Watkins v. Atlantic Coast Line R. Co., 97 S. C. 148, 81 S. E. 426; Sullivan v. Fant, 51 Tex. Civ. App. 6, 110 S. W. 507; Missouri, K. & T. R. Co. v. Brown, Tex. Civ. App., 155 S.W. 979; Lenicke v. Funk & Co., 78 Wash. 460, 139 Pac. 234, Ann. Cas. 1915D. 23.

The declarations of an agent may be received provisionally, as verbal acts indicating that he was acting on another's behalf, leaving it to subsequent proof to establish his connection as agent. Clough v. Rockingham County L. & P. Co., 75 N. H. 84, 71 Atl. 223.

Somewhat in explanation of this rule we quote the following from Mechem on Agency (2nd Ed.) Sec. 285, note 81:

"When it is said that the agent's statements, admissions and declarations cannot be made use of until the fact of his agency has been shown by other evidence, it is, of course, not meant that there must first be a separate verdict found establishing that fact; what is meant is that there must first be some competent testimony offered tending to prove that fact."

HUMOR OF THE LAW

"I can't keep the visitors from coming up," said the office boy dejectedly to the editor. "When I say you're out they don't believe me. They say they must see you."

"Well," said the editor, "just tell them that's what they all say. I don't care if you sass them. I must have quietness."

That afternoon there called at the office a lady. She wanted to see the editor, and the boy assured her that it was impossible.

"But I must see him!" she protested. "I'm his wife!"

"That's what they all say," replied the boy.

After observing the phenomenon through several years, we have decided that the following sums up pretty fairly what is the matter with almost any man with whom you play golf:

1. It is not his day.
2. He is doing worse than he ever did in his life.
3. He cannot imagine what is the matter with him.
4. The exhibition he is giving bears not the slightest resemblance to the one he usually gives.
5. His caddy is impossible.
6. He is not getting the breaks.
7. He had no sleep on the prior night.

It is in the enchantment of delusion that the average man plays golf—the delusion that his game is better than it is. Realizing the truth, almost no one would play.

—By Clark McAdams,
St. L. P.-D.

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Automobiles—Agency of Driver.**—Evidence that defendant taught his daughter to drive his automobile, and that when she struck plaintiff she was driving for the purpose of getting apples for the use of the family, made a question for the jury as to whether she was defendant's agent, servant, or employe acting within the scope of her authority.—Lywelyn v. Lowe, Mo., 239 S. W. 535.

2.——Indemnity Bond.—In an action against a surety on an indemnity bond for being struck by an automobile, where the bond made defendant liable only for damages caused while the automobile was on a regular route, in view of evidence that the automobile was being operated on the route when or just before the injury was sustained, defendant was not entitled to a peremptory instruction.—Lilienthal v. Motor Car Indemnity Exchange, Tex., 239 S. W. 906.

3.—License Tag.—On a trial for operating an automobile without a tag on the rear, evidence showing that the tag was on the car at the beginning of the trip, and not showing that defendant continued to drive the car with knowledge that it was lost, was insufficient to support conviction.—Harden v. State, Ga., 112 S. E. 159.

4.—Right of Way.—As between a motor vehicle moving along a main artery of travel and another vehicle emerging from private grounds, the former has the first right to pass.—Uhl v. Fertig, Cal., 206 Pac. 467.

5. **Bankruptcy**—Delivery of Books.—Where the books of a bankrupt firm were delivered without objection to the receiver in bankruptcy, the bankrupt is not entitled to an injunction against the production of such books before the grand jury as evidence of a criminal offense committed by the bankrupt, on the ground that he was thereby deprived of his constitutional privileges under Const. Amends. 4 and 5, though, if he had objected to delivering the books to the receiver, he could not have been compelled to do so, without being given immunity against their use in a criminal prosecution. In re E. Dier & Co., U. S. D. C., 279 Fed. 274.

6.——Discharge.—Under Bankruptcy Act, § 14b, creditors have the sole power to determine whether the trustee shall oppose the bankrupt's discharge; but, when authority is granted to the trustee, he is in the same position and may exercise the same rights as parties in interest.—In Re Ruhlman, U. S. C. C. A., 279 Fed. 250.

7.——Title of Trustee.—A trustee in bankruptcy, in an action to protect or recover the bankrupt's assets, stands for and in the place of creditors and stockholders of the bankrupt. Throckmorton v. Hickman, U. S. C. C. A., 279 Fed. 196.

8.——Preference.—Where an automobile, against which there was a duly recorded chattel mortgage, was taken into another county and there kept for more than 30 days without recording the chattel mortgage in that county, as required by Rem. Code Wash. 1915, § 3668, to preserve the lien, except as between the parties, but was returned to the county in which the mortgage was recorded before an adjudication in bankruptcy against the mortgagor, the mortgagee was entitled to a preferred claim against the property, since no title vested in the trustee in bankruptcy prior to the adjudication, and the Bankruptcy Act does not operate as an attachment to the bankrupt's property, or create a lien in favor of general creditors.—In Re West Side Auto Co., U. S. D. C., 279 Fed. 301.

9.——"Voidable Preference."—Where a seller failed to record his conditional sale contract at the time of the sale, so that property became that of the buyer in so far as his creditors were concerned under the state statute, the recording of such contract within four months of the bankruptcy of the buyer, and while the buyer was insolvent, created a voidable preference, under Bankruptcy Act, §§ 60a, 60b.—In Re Loeb's, Inc., U. S. D. C., 279 Fed. 269.

10. **Banks and Banking**—Application of Deposit.—Where a bank receives by the same mail a number of checks drawn against it by the same person, whose deposit is not large enough to meet all of them, if it applies the amount on hand so far as it will go to the payment of the checks in any order it sees fit, it will not thereby render itself liable to the holder of a check remaining unpaid, assuming that there was no exceptional reason for preference.—Chadd v. Byers State Bank, Kan., 206 Pac. 880.

11.——Joint Tenancy.—An agreement by two depositors with a bank that all deposits then or thereafter made for the account are the joint property of the depositors, and upon the death of either shall become the absolute property of the survivor, creates a joint tenancy in the deposit with right of survivorship, so that an assignee of the survivor is entitled to the account.—Miller v. American Bank & Trust Co., Col., 206 Pac. 796.

12.——Lien.—Ordinarily a bank has a general lien on all of an insolvent debtor's securities held by it for the amount of his general balance, unless delivered under a particular agreement limiting their application, and accordingly securities pledged for one debt, and not to secure the payment of other obligations, cannot be held for other debts.—Prudential Realty Co. v. Allen, Mass., 135 N. E. 221.

13. **Bills and Notes**—Alteration.—Bank and liable for alteration of cashier's checks issued with blanks filled.—Broad Street Bank v. National Bank of Goldsboro, N. C., 112 S. E. 11.

14.——Holders in Due Course.—The title of an agent who negotiated his principal's notes in breach of faith was defective when he negotiated the notes within Rev. St. 1908, § 4518, so that the burden is on the purchasers from such agent, under section 4522, to show that they acquired the notes in due course.—McClellan v. Morris, Col., 206 Pac. 575.

15. **Carriers of Goods**—Diverting Shipment.—A shipper having the right to divert a car because of the consignee's telegram refusing the car, the carrier, which had agreed with the shipper to divert it, cannot deny liability for not doing so because no proof of the shipper's right to divert had been made to the carrier before it so agreed; it not having exacted any such proof, to which it was entitled if it had seen fit to require it.—Amber v. Payne, Mo., 239 S. W. 588.

16. **Carriers of Passengers**—Degree of Care.—Where a carrier of passengers attempts to excuse itself for the results of an injury caused by a derailment of one of its cars, by showing that such car was derailed by an obstruction rolling down upon its track from off the hillside above its right of way, it is error to instruct the jury, on motion of the plaintiff, that the carrier, under all circumstances, is required to exercise the highest degree of care to discover and prevent obstructions upon its track from any source.—Thomas v. Monongahela Valley Traction Co., W. Va., 112 S. E. 228.

17.——Indemnity Bond.—The provisions of an ordinance requiring carriers of passengers within the city to give an indemnity bond, and giving persons damaged through the carrier's fault a right of action against the surety, must be read into the bond, and fix the rights, as well as the obligations, of the surety.—Horsthemke v. National Surety Co., La., 91 So. 544.

18.——Refusal of Accomodations.—Where passengers were refused admission to cars designated, a sleeping car company was not absolved from liability for its refusal to furnish accommodations conforming to tickets purchased, by the fact that the holders surrendered their tickets and accepted a return of the price thereof.—Pullman Co. v. Walson, Ark., 239 S. W. 385.

19.——Relation of Passenger.—A passenger, by leaving a railroad train temporarily for a purpose not connected with his trip, does not lose his character as such passenger.—Missouri Pac. R. Co. v. Kennedy, Ark., 239 S. W. 376.

20. **Commerce**—Interstate Agencies.—In the receipt of live stock by rail and in their delivery by rail for shipment to other states, the stockyards are interstate commerce agencies.—Stafford v. Wallace, U. S. S. C., 42 Sup. Ct. 397.

21. **Constitutional Law**—Due Process.—Unreasonable delay in giving notice to claimants of liquor seized without warrant under Code Cr. Proc. § 802b, as added by Laws 1921, c. 156, to show cause why it should not be forfeited amounts to a seizure without due process and a delay of justice, and where the seizure was made June 23d, and the return made by the officer on June 29th, but no notice to show cause was signed until September 6th, the liquors must be returned, though the seizure was in the first instance properly made.—People v. Diamond, N. Y., 135 N. E. 200.

22. **Contracts**—Mutuality.—A publisher's contract with a paper company for the purchase of paper, at a fixed price for shipments during the last four months of 1919, and for 1920 the price to be agreed on, but "in no event to be higher than the contract price for news print charged by" a named export paper company "to the larger consumers," was, as to 1920 shipments, an option to the publisher to buy at the maximum price, and was not void for lack of mutuality; the prior unconditional portion of the contract being sufficient consideration for the option.—Sun Print. & Pub. Ass'n v. Remington Paper & P. Co., N. Y., 193 N. Y. S. 698.

23. **Corporations**—Authority of General Manager.—The general manager of one of a chain of stores operated by a corporation has apparent authority to employ a person as a clerk in the store for the term of one year, and the corporation is bound by such contract, though there exists an undisclosed limitation of the agent's authority to make contracts of employment for more than a month.—Strickland v. S. H. Kress & Co., N. C., 112 S. E. 30.

24. **Damages**—Delay.—In an action involving the amount due plaintiff for rebuilding two oil rigs on lands held by defendant under an oil and gas lease, the defendant contended that, if the derricks had been erected a few days earlier, he would have succeeded in selling oil and gas leases for $1,500. Held, that an objection was properly sustained to evidence in support of this claim on the ground that the damages sought to be established were remote, speculative, and uncertain: there being nothing to show that the parties contemplated that a loss of such profits might be recovered for breach of the contract.—Childers v. Tobin, Kan., 206 Pac. 876.

25.——Delay.—In an action for damages for failure to complete an oil and gas well, it is held that the court properly charged the measure of damages to be the expenditure of the plaintiff under the contract over and above the amount due the defendant had he completed the well. Hanson Oil & Gas Co. v. Howerton, Kan., 206 Pac. 909.

26.——Measure of.—In an action against a railroad company for damages to plaintiff's truck resulting from collision where the jury found the difference in value of the truck immediately before and after the accident was $1,500 and the reasonable cost of repairing it was $1,000, held, that the conflict in the findings is apparent only, and the court was justified in reconciling the same and entering judgment for the larger amount.—Chicago, R. I. & G. Ry. Co. v. Zumwalt, Tex., 239 S. W. 912.

27. **Electricity**—Negligence Per Se.—Where the breaking of electric wire was indicated instantly in the office of the electric power company by means of an instrument kept for that purpose, the failure of the company, after receiving such notice of the breaking of the wire, to render the situation perfectly safe, held, negligence per se.—Kidd v. Kansas City Light & Power Co., Mo., 239 S. W. 584.

28. **Fixtures**—Personal Property.—A former lessee may recover from later lessee of same premises for a boiler, etc., erected by the former while tenant as against the latter's claim that the property had become a part of the realty, where the landlord made no claim to the property, and did not object to the plaintiff taking it, as the fixtures remained personal property by reason of the landlord's consent.—Stone v. National Surgical Stores Co., N. Y., 193 N. Y. S. 684.

29.——Frauds, Statute of Description of Property.—In an action to recover money paid on a land purchase contract, where the description of the property was, "Southwest corner 28th and Meinecke, purchase price, etc.," it not appearing whether one lot or more was intended, the description was too vague and uncertain to meet requirements of the statute.—Durkin v. Machesky, Wis., 188 N. W. 97.

30.——Void Agreement.—A conveyance from its president on the theory that he was to take title to land in his own name and then convey the land to it cannot be enforced for the reason that such an agreement would be void under the statute.—MacGinniss Realty Co. v. Hinderager, Mont., 206 Pac. 436.

31. **Insurance**—Authority to Do Business.—Since the statutes do not declare a policy of insurance written without a certificate of authority to be void, nor prohibit any one from procuring such insurance, the insurance companies cannot defeat recovery on a policy issued by them because of the want of such certificate.—Hartford Fire Ins. Co. v. Galveston, H. & S. A. Ry. Co., Tex., 239 S. W. 919.

32. —Forfeiture.—Where the insurance company had erroneously declared a forfeiture of the insurance policy and continued to insist upon such forfeiture, a declaration by insured in a subsequent application that he had no insurance was not an acquiescence in the asserted forfeiture, and does not estop a subsequent assertion by the beneficiary of insurer's liability under the policy.—New York Life Ins. Co. v. Norris, Ala., 91 So. 595.

33.——Good Health.—Provision that policy must be delivered to applicant "while in good health," means same condition of health as at date of application.—New York Life Ins. Co. v. Smith, Miss., 91 So. 456.

34.——Limitation.—Laws 1913, p. 351, § 44, prohibiting a life policy from limiting action to less than five years, does not govern an accident policy, even as to indemnity in case of death from accident.—Union Health & Accident Co. v. Welch, Col., 206 Pac. 790.

35.——Prima Facie Case.—In an action on a life insurance policy, where plaintiff is in possession of the policy at the time of the trial, or it is shown that the insured was in possession of it at his death, upon introducing the policy and proving the death of the insured, a prima facie case is made.—Acuff v. New York Life Ins. Co., Mo., 239 S. W. 551.

36.——Subrogation.—Where policy, as to the insured mortgagor, was forfeited by his taking out additional insurance without insurer's consent, held that the insurer's right to subrogation to the mortgagee's rights upon paying the mortgagee under the policy, were not forfeited by the fact that insurer had litigated the mortgagee's claim under the policy.—Boatner v. Home Ins. Co., Tex., 239 S. W. 928.

37.——Warranty.—Employer's agreement, constituting a part of workmen's compensation policy, that no person was or would be employed in violation of law as to age, held a warranty in view

of Civ. Code, § 2608, since employment of person under legal age materially affected the risk.—Gise v. Fidelity & Casualty Co., Cal., 206 Pac. 624.

38. **Master and Servant.**—Assumption of Risk.—A servant does not assume risks occasioned by the negligence of the master. Jones v. Queen City Woodworks & Lumber Co., Mo., 239 S. W. 532.

39.——Course of Employment.—Where a foreman reprimanded and discharged an employee, and was assaulted and injured by the employee as a result of the discharge, and while he, pursuant to his duty, was settling with the employee, the injury arose out of and in the course of the employment, so as to be compensable under the Employers' Liability Act, though he was not without fault in that he charged the employee with lying, and resisted the assault by striking the discharged employee with a broom.—Guderian v. Sterling Sugar & Ry. Co., La., 91 So. 546.

40.——Course of Employment.—Injury to smelter plant employee by the breaking of a staging while carrying a 100-pound bolt to be placed in a concrete pit constructed as an addition to a sample mill used in crushing ore for the smelter, was one arising out of the conditions of employer's business, within Civ. Code Ariz. 1913, pars. 3154, 3155, 3156 (subds. 8, 10), and 3158, protecting workmen in dangerous occupations.—United Verde Extension Mining Co. v. Littlejohn, U. S. C. C. A., 279 Fed. 223.

41.——Independent Contractor.—In an action for injuries from falling into an unguarded ditch across a sidewalk in front of defendant's premises, where defendant alleged that persons engaged by it to dig the ditch were independent contractors, who were engaged simply to install a connection with a gas main, and that it was not necessary to dig the ditch in doing so, the burden was on plaintiff to bring his case within the exception to the general rule exempting the owner from liability for the negligence of an independent contractor.—Harris v. Farmers' & Merchants' State Bank, Tex., 239 S. W. 1027.

42.——Truck Driver.—A truck owner supplied an express company with a motor van and chauffeur. The company loaded and unloaded the van at terminals and sealed it on departure and unsealed it at destination, and between departure and destination the truck was controlled by the chauffeur without interference, and while on a trip it ran over plaintiff's intestate. Held, that the truck driver was in the service of the truck owner, and the company, having no control of him during the trips, was not liable for the injury. Charles v. Barrett, N. Y., 135 N. E. 199.

43.——Truck Driver.—Where defendant agreed as contractor to do all the trucking work for an incorporated milk company and to furnish chauffeurs, gasoline, and protection for the goods and to be liable for shortage and breakage, his compensation to be certain sum per day for each truck, a chauffeur driving a truck was the servant of defendant, so that defendant was liable for a death caused by negligent driving, though the company was to furnish the necessary permits from the board of health and the chauffeurs were told to report to the company and take orders from its foreman.—Braxton v. Mendelson, N. Y., 135 N. E. 198.

44. **Navigable Waters**—Test of Navigability.—The fact that the surveyors of the public lands ran a meander line along the bank of a river, and did not extend the lines across it, has little significance in determining its navigability, since the same thing was done on streams known to be unnavigable, and the surveyors were not clothed with power to settle questions of navigability.—State of Oklahoma v. State of Texas, U. S. S. C., 42 Sup. Ct. 406.

45. **Negligence**—Attractive Nuisance.—Though one who constructed a swing to be used by school children for play is liable for failure to use ordinary care in constructing it, the doctrine of attractive nuisance does not apply in such a case, since that doctrine requires one maintaining a dangerous mechanism to use proper care to prevent a child from playing on it; whereas the swing, if properly constructed, was not a dangerous mechanism, and was intended to be used by the children.—Solomon v. Red River Lumber Co., Cal., 206 Pac. 498.

46.——Imputability.—In an action for injuries to plaintiff from an obstruction in a highway, while riding with her husband as a passenger in an automobile, negligence on the part of her husband in not exercising due care in approaching the obstruction did not preclude plaintiff's recovery.—Laird v. Berthelote, Mont., 206 Pac. 445.

47.——Invitee.—Where an oil salesman, who was also an expert on the application of lubricants, had supervised the application of grease to the ways at previous ship launchings, and at the time of another launching was called to the shipbuilding plant and invited by the chief marine architect to make an inspection, and, though seen by the manager of the works, was given no intimation that he was exceeding his lawful rights as a guest, he was entitled to the rights of an invitee, and not merely those of a licensee, even though the employee telephoning hi mto come to the plant was without authority to extend such invitation.—Gray v. Foundation Co., La., 91 So. 527.

48. **Nuisance**—Talking Machine.—Persons occupying places of business opposite the place of business of a dealer in talking machines held entitled to damages and an injunction against the playing of such machine outside or just inside the door of his store, where he used a loud needle with no muffling device and played it substantially all day, except during cold and stormy weather, and the continuous and monotonous playing thereof injuriously affected plaintiffs and their employees, and was a substantial addition to the other street noises, and if played in such a manner as not to be heard in plaintiffs' places of business would have had practically all of its advertising value.—Stodder v. Rosen Talking Mach. Co., Mass., 135 N. E. 251.

49. **Physicians and Surgeons**—Due Care.—A surgeon's duty of exercising due care to see that no packing is left in the abdomen of one operated on is not conclusively shown by evidence that he followed the usual practice and custom among skilled practitioners of relying on count by the nurses.—Paro v. Carter, Wis., 188 N. W. 68.

50. **Principal and Agent.**—Ostensible Agency.—A judgment for defendants on the theory that one from whom they purchased plaintiff's cattle was his ostensible agent cannot be sustained, where many of the circumstances tending to show an ostensible agency occurred after the first purchase and some of them after a second purchase, and there was no evidence that defendants at the time of the purchases had any knowledge of the circumstances which had already occurred tending to establish an ostensible agency.—Pacific States Corporation v. Gill, Cal., 206 Pac. 489.

51. **Railroads**—Taxation.—Laws 1919, c. 255, authorizing the Highway Commission to relocate highway to protect public from danger of railroad crossings and to assess extra cost made necessary by reason of the crossings against the railroad to the extent of the benefits, held not violative of Const. art. 8, § 1, requiring taxation to be uniform, but an exercise of the police power of the state.—Chicago & N. W. Ry. Co. v. Railroad Commission, Wis., 188 N. W. 86.

52.——Unfenced Track.—Plaintiff who was injured after going upon an unfenced railroad right of way need not prove that the existence of a lawful fence at that point would have prevented his going upon the track to entitle him to recover under St. 1921, § 1810.—Berndl v. Hines, Wis., 188 N. W. 81.

53. **Sales**—Abrogation.—The owner of a coal mine, who has sold the output thereof under an executory contract, is not justified in treating the contract as abrogated, because the purchaser is unable to take some of the coal offered at a time when the market has suddenly declined sharply, and enters into negotiations for a modification of the contract, but does not repudiate the same or deny his obligation thereunder, and is making efforts to dispose of the coal offered to the best advantage, so as to minimize his loss as far as possible.—Fayette-Kanawha Coal Co. v. Lake & Export Coal Corp., W. Va., 112 S. E. 222.

54.——Acceptance.—Where railroad ties, which were to be cut and delivered on the railroad right of way, were so delivered in compliance with the instructions of the railroad, this amounted to a sufficient acceptance of the ties to support an action for their value.—Southern Ry. Co. v. Cathey, Ga., 111 S. E. 825.

55.——Caveat Emptor.—A Tennessee seller of an automobile with retained title may recover possession of the car in this state as against a subsequent innocent purchaser for value without notice, except where seller authorizes, express or implied a resale of car by vendee; caveat emptor applies.—Harrison v. Broadway Motor Co., Miss., 91 So. 453.

56. **Schools and School Districts**—Foreign Languages.—The statute, relating to the teaching of foreign languages, is a reasonable exercise of the police power and is not unconstitutional, as being in violation of either the state or federal Constitutions. It does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law; nor is it invalid, as a restriction upon the freedom of religious worship, nor as an unwarranted interference with the giving of religious instruction.—Nebraska Dist. of Evangelical Lutheran Synod v. McKelvie, Neb., 187 N. W. 927.

57.——Tax Levy.—Where it is not shown that a school district organized by Act Aug. 18, 1921, attempted to exercise the powers of a town or village incorporated under the general laws, that the act may be void so far as it conferred such powers in violation of Const. art. 3, § 35, as to subject and title, affords no ground for injunction against a tax levy under the act.—Hill v. Smithville Independent School Dist., Tex., 239 S. W. 987.

58. **States**—Loan to Soldiers.—St. 1921, p. 969, establishing the Veterans' Welfare Board, known as the California Veterans' Welfare Act, providing for the purchasing and improving of lands and selling in small parcels to veterans who will become actual settlers, and St. 1921, p. 315, creating Veterans' Farm and Home Purchase Act, in so far as the laws relate to the appointment of the Veterans' Welfare Board and the incurring by them of expenses for carrying out of the laws, are not invalid within Const. art. 4, §§ 31 and 32, as a gift from the state or loan of its credit.—Veterans' Welfare Board v. Riley, Cal., 206 Pac. 631.

59. **Taxation**—Benevolent Corporation.—A corporation formed to carry out a testamentary provision, creating a trust fund to be used for the erection of an apartment building to be conducted solely for the purpose of "providing unmarried working women with homes and wholesome food at a small cost to them and in deserving cases without cost," is one solely for charitable and benevolent purposes, and such of its real property as is held exclusively for such purposes is exempt from taxation, under Tax Law, § 4(7).—Webster Apartments v. City of New York, N. Y., 193 N. Y. S. 650.

60.——Charitable Gift.—Where the estate was charged with a tax on bonds owned by testatrix on which she had failed to pay the tax in her lifetime, a gift to a charitable corporation of one-third of the residue is charged with one-third of the amount of back tax, since the estate which she left consisted of that portion of her property which remained after payment of the tax and all other debts and expenses.—In Re Le Fevre's Estate, N. Y., 135 N. E. 203.

61. **United States**—Emergency Fleet Corporation.—The Shipping Act of September 7, 1916, giving the Shipping Board power to form a corporation under the laws of the District of Columbia, contemplated a corporation in which private persons might be stockholders, and which was to be formed like any business corporation with capacity to sue and be sued, and the fact that the United States took all the stock of the corporation did not affect the legal position of the company, so as to require suits against it to be brought in the Court of Claims.—Sloan Shipyards Corp. v. United States Shipping Board, U. S. S. C., 42 Sup. Ct. 386.

62. **Usury**—Commission to Agent.—Where an agent who purchased notes for his principal knew that the transaction in which they were given was tainted with usury because of a commission reserved to himself in addition to the full legal rate of interest, he is presumed to have informed his principal of that fact.—Gardner v. Ruffner, Ala., 91 So. 580.

63. **Waters and Water Courses**—Adverse User.—A claimant to a portion of flood waters only is entitled to such proportion thereof as has been actually diverted and put to beneficial use and used adversely during the period of flood waters continuously and without interruption for a period of five years.—Armstrong v. Payne, Cal., 206 Pac. 638.

64. **Wills**—Testamentary in Character.—Where decedent executed a will in regular form giving all his property to his wife and at the same time executed a contract to which he, his wife, and the wife's trustees and attorneys in fact were parties, whereby the wife agreed to convey the property with certain exceptions to the trustees for the benefit of decedent's collateral heirs, held, that the contract was not testamentary in character nor entitled to probate.—In Re O'Connor's Estate, Pa., 117 Atl. 61.

65. **Workmen's Compensation Act**—Casual Employment.—Where a person employed another to do some repair work and remodeling on his store building, which work it was contemplated would last 10 days or two weeks, and when it was contemplated by the parties that the employee should continue working for such person in the repairing of a fence and building of additional garages and in the erection of another building, which work it was expected would last throughout the summer, and where it was agreed that the employee should receive 75 cents an hour for 7½ hours a day, and should work five days a week, held, that such employment was not "casual," within the meaning of that term as used in the Workmen's Compensation Law.—Kaplan v. Gaskill, Neb., 187 N. W. 943.

66.——"Employee."—Where one employed as a carpenter and handy man in a moving picture theater of a corporation was injured while widening the door of a garage at the private residence of the controlling stockholder who kept his automobile, chiefly used in the business, at the garage, the injury was received while doing work as an employee within Workmen's Compensation Insurance and Safety Act 1917, § 8, and the terms of a policy of insurance covering work incident to the operation of theater.—Associated Theaters v. Industrial Accident Commission, Cal., 206 Pac. 665.

67.——"Interstate Business."—Cleaning, repair, and adjustment of large stationary gas engines constituting part of a compressor plant of a company producing, transporting and selling natural gas both within and without this state used in the collection of such gas from the wells and drawing and forcing it through pipe lines from the wells to the places of sale and consumption, by means of pumps and other instrumentalities, are parts of its interstate business.—Smith v. United Fuel Gas. Co., W. Va., 112 S. E. 205.

68.——Intrastate Work.—Under the Employers' Liability Act, § 30, providing that it shall not apply to common carriers engaged in interstate or foreign commerce, and not subject exclusively to the legislative power of the state, it does not apply though the employee at the time of the injury was engaged in intrastate work.—Salvaggio v. Illinois Cent. R. Co., La., 91 So. 549.

69.——Lapse of Time.—That death did not occur for a considerable time after the accident is not conclusive that it resulted from a cause other than the injury, where it occurred within the 300-week period fixed by Workmen's Compensation Act (Act June 2, 1915), though the lapse of time is an important factor to be considered.—Watson v. Lehigh Coal Navigation Co., Pa., 116 Atl. 889.

70.——Total Disability.—Where a servant suffers a fracture of a leg between the knee and the ankle, and at the end of 150 weeks is still in the hospital waiting for the wound to heal, he is entitled to compensation for total disability beyond the 150 weeks, where he has not lost his foot, or, permanently, the use of it, under Workmen's Compensation Act, § 306.—Berskis v. Lehigh Valley Coal Co., Pa., 116 Atl. 888.